

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HELEN PEREZ,) Case No. 12-5403-SC
)
Plaintiff,) ORDER DENYING MOTION TO
) REMAND
v.)
)
CONSOLIDATED TRIBAL HEALTH)
PROJECT, INC.,)
)
Defendant.)
_____)

I. INTRODUCTION

Plaintiff Helen Perez ("Perez") brings this action in connection with an alleged slip-and-fall injury she sustained on the premises of Defendant Consolidated Tribal Health Project, Inc. ("Tribal Health"). Perez initially filed a complaint in Mendocino County Superior Court. The U.S. Attorney subsequently removed on the grounds that Tribal Health is funded pursuant to the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450 et seq., and thus Perez's claims are governed by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b). ECF No. 1 (Notice of Removal ("NOR")). Perez now moves to remand the action

1 back to state court. ECF No. 16 ("Mot."). Tribal Health has
2 opposed the motion, ECF No. 21 ("Opp'n"), but Perez has not filed a
3 reply brief. Pursuant to Civil Local Rule 7-1(b), the Court finds
4 this matter appropriate for resolution without oral argument. For
5 the reasons set forth below, Perez's motion to remand is DENIED.

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7 **II. BACKGROUND**

8 On March 3, 2011, Perez visited Tribal Health's facilities in
9 Redwood Valley, California for a medical appointment.¹ See ECF No.
10 1-1 ("Compl."). During her visit, Perez slipped and fell in Tribal
11 Health's restroom. Id. Perez alleges that Tribal Health was
12 "careless, negligent, and departed from accepted and standard
13 medical standards, generally, and specifically, in failing to
14 properly maintain their office and restroom, causing [her] to
15 sustain personal injuries." Id. In her motion for remand, Perez
16 concedes that her Complaint "was not a model of clarity," and that
17 she intended only to bring a cause of action for general
18 negligence, not medical malpractice. Mot. at 7-8.

19 Since at least 2005, Tribal Health has operated under a
20 compact and funding agreement with the United States Department of
21 Health and Human Services ("HHS") pursuant to the ISDEAA. Pete
22 Decl.² Exs. A ("Tribal Health-U.S. Compact"), B ("CY2011 Funding
23 Agreement"). The Tribal Health-U.S. Compact provides that "FTCA
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25 ¹ In her Complaint, Plaintiff alleges that her appointment was
26 either on March 3, 2012 or March 3, 2010. Plaintiff's Motion
27 states that, due to a scrivener's error, the Complaint sets for the
wrong date. Mot. at 7.

28 ² Preston Pete, Consolidated Health's finance director, filed a
declaration in opposition to Perez's motion to remand. ECF No. 23
("Pete Decl.").

1 coverage of [Tribal Health] and its employees shall be governed by
2 Pub. L. 93-638, as amended, and federal regulations relating
3 thereto." Tribal Health-U.S. Compact Art. IV § 7(a). The Funding
4 Agreement is incorporated into the compact, id. Art. VIII § 1, and
5 obligates Tribal Health to provide for a number of programs,
6 services, functions, and activities, including general health
7 services and general program administration, CY2011 Funding
8 Agreement § 2(A), (C). Under the CY2011 Funding Agreement, general
9 program administration includes responsibility for "facilities,
10 personnel, property and supply, housekeeping, and
11 telecommunications management," as well as the maintenance of
12 "functional and safe equipment and physical plant." Id. § 2(C)(2)-
13 (3).

14 Perez filed this action in Mendocino County Superior Court on
15 March 5, 2012. Tribal Health filed a demurrer in Superior Court,
16 arguing that, as a tribal business entity, it was entitled to
17 sovereign immunity. ECF No. 19 ("Pl.'s RJN") Ex. B. Judge Cindee
18 Mayfield overruled the demurrer, finding that the issue called for
19 consideration of evidence beyond that presented on the face of the
20 Complaint. Id. The U.S Attorney received notice of the action on
21 October 12, 2012 and removed the action to federal court on behalf
22 of Tribal Health on October 19, 2012. NOR ¶ 2.

23 After removal, Tribal Health moved to dismiss on the grounds
24 that (1) only the United States is a proper defendant in an FTCA
25 action, and (2) Perez failed to file an administrative claim with
26 HHS as required by the FTCA. ECF No. 4 ("MTD"). Perez failed to
27 respond to the motion and the Court issued an order to show cause.
28 At the show cause hearing, Perez's counsel argued that the case was

1 improperly removed. The Court directed Perez to file a motion to
2 remand, which Perez subsequently did.

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4 **III. DISCUSSION**

5 In her motion to remand, Perez argues that the Court lacks
6 subject-matter jurisdiction under 28 U.S.C. § 1331, because she
7 does not seek relief under federal law and a federal question is
8 not apparent from the face of her complaint. Mot. at 9-10. But §
9 1331 does not control here because Perez has brought suit against
10 an agency of the United States. Accordingly, the Court's
11 jurisdiction should be assessed under 28 U.S.C. § 1442(a).³

12 Section 1442(a) allows for the removal to federal court of any
13 civil action against the "United States or any agency thereof . . .
14 for or relating to any act under color of such office" 28
15 U.S.C. § 1442(a)(1). Section 1442 is to be "interpreted broadly in
16 favor of removal." Durham v. Lockheed Martin Corp., 445 F.3d 1247,
17 1252 (9th Cir. 2006). "A party seeking removal under section 1442
18 must demonstrate that (a) it is a 'person' within the meaning of
19 the statute; (b) there is a causal nexus between its actions, taken
20 pursuant to a federal officer's directions, and plaintiff's claims;
21 and (c) it can assert a 'colorable federal defense.'" Id. at 1251.
22 Here, all three requirements are met.

23 With respect to the first requirement of § 1442, Tribal Health
24 is a federal entity covered by the FTCA for purposes of Perez's
25 negligence claim under the ISDEAA. The ISDEAA provides that tribal
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27 ³ Perez also argues that the action was untimely removed. However,
28 under the FTCA, the United States has the right to remove an action
to a federal district court "at any time before trial." 28 U.S.C.
§ 2679(d)(2).

1 organizations may enter into "self-determination contracts" with
2 the Department of the Interior ("DOI") and HHS to administer
3 programs or services that would otherwise have been administered by
4 the federal government. 25 U.S.C. § 450f. It also provides that
5 for the purposes of personal injury claims "resulting from the
6 performance . . . of medical, surgical, dental, or related
7 functions," tribal organizations carrying out self-determination
8 contracts are "deemed to be part of [HHS's] Public Health Service."
9 Id. § 450f(d).

10 Perez argues that 25 U.S.C. § 450f is inapplicable here
11 because her injury arose out of a slip and fall, not a personal
12 injury "resulting from the performance . . . of medical, surgical,
13 dental, or related functions." Mot. at 11-12. But her injury did
14 result from Tribal Health's performance of medical functions.
15 Perez visited Tribal Health for a medical appointment. In any
16 event, to the extent that there is any ambiguity concerning the
17 statutory language "resulting from the performance . . . of medical
18 . . . functions," HHS and DOI have promulgated regulations
19 clarifying that ambiguity. Pursuant to 25 C.F.R. § 900.204, the
20 "FTCA [is] the exclusive remedy for a non-medical related tort
21 claim arising out of the performance of a self-determination
22 contract[.]"⁴

23 As to the second requirement of § 1442, there is a causal
24 nexus between Tribal Health's actions as a federal entity and
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26 ⁴ Perez also argues that HHS admits that the FTCA only protects
27 health centers from medical malpractice claims, pointing to an HHS
28 website which states that federally support health centers are
"immune from suit for medical malpractice claims." Mot. at 15.
But nothing on that website states that a health center's immunity
is limited to medical malpractice claims.

1 Perez's claims. Perez's claims arise out of her medical
2 appointment at Tribal Health on March 3, 20011. Perez alleges that
3 Tribal Health provided her with medical care and that it "was
4 careless, negligent, and departed from accepted . . . standard[s] .
5 . . in failing to properly maintain their office and restroom."
6 Compl. Tribal Health operates under a compact and funding from
7 HHS, and the compact and funding agreement obligate Tribal Health
8 to provide general health services, as well as maintenance and
9 management of its facilities. See Tribal Health-U.S. Compact;
10 CY2011 Funding Agreement.

11 With respect to the third requirement of § 1442, Tribal Health
12 has asserted a colorable federal defense of sovereign immunity.
13 The FTCA constitutes a waiver of federal sovereign immunity because
14 it permits torts claims against the federal government in certain
15 instances, but it requires plaintiffs to present their claims to
16 the appropriate Federal agency prior filing to suit. See 28 U.S.C.
17 § 2675. Tribal Health argues that Perez has failed to meet this
18 requirement.⁵ See MTD.

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28 ⁵ Perez's motion to remand also includes a demand for a jury trial.
That request is DENIED. Pursuant to 28 U.S.C. § 2402, any action
brought under the FTCA must tried by the court without a jury.

1 **IV. CONCLUSION**

2 For the reasons set forth above, Plaintiff Helen Perez's
3 motion to remand is DENIED. Defendant Tribal Health's motion to
4 dismiss is still pending before the Court. Perez shall respond to
5 that motion within fourteen (14) days of the signature date of this
6 Order. Failure to do so may result in dismissal of this action
7 with prejudice.

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9 IT IS SO ORDERED.

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11 Dated: March 21, 2013



12 UNITED STATES DISTRICT JUDGE
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